Thomas Carl Michael v Perkasa Padu Sdn Bhd & Ors (Malaysian Assurance Alliance Bhd & Anor, third parties)

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-292 OF 1996
KAMALANATHAN RATNAM J
10 NOVEMBER 1999

Civil Procedure *— Striking out — Statement of claim — Case rested on interpretation of clause in contract — Case weak and not likely to succeed at trial — Whether warrants striking out — Rules of the High Court 1980 O 18 r 19*

The plaintiff sued the first defendant for breach of contract of employment and also based his claim against all the defendants on negligence. The second to fourth defendants took third party proceedings against the first named third party as insurers and subsequently the second named third party who was the main contractor of the project and who was also named as the 'insured' in the Contractors All Risk Policy. The second named third party applied to strike out the second to fourth defendants' statement of claim against them under O 18 r 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the court. The application was dismissed by the senior assistant registrar and the second named third party appealed.

Held, dismissing the appeal with costs:

As the second named third party conceded that their case rested on the interpretation of cl 10.01 of the sub-contract between them and the third defendant, the second named third party could not contend that there was no case against them to warrant the application to strike out the statement of claim. So long as the pleadings disclosed some cause of action or raise some question fit to be decided by the judge, the mere fact that the case would be weak and not likely to succeed at trial would not be a ground for the pleadings to be struck out (see pp 252H–253A); *Citibank Bhd v ND Chandrasegaram Nee & Ors* [1999] 5 MLJ 440 followed.

[Bahasa Malaysia summary

Plaintif telah menyaman defendan pertama untuk pemecahan kontrak pekerjaan dan juga mendasarkan tuntutannya terhadap semua defendan-defendan untuk kecuaian. Defendan kedua sehingga keempat mengambil prosiding pihak ketiga terhadap pihak ketiga pertama sebagai penginsurans dan kemudian pihak ketiga yang kedua yang merupakan kontraktor utama projek tersebut dan juga dinamakan sebagai pemegang insurans di dalam Polisi Semua Risiko Kontraktor. Pihak ketiga yang kedua memohon untuk membatalkan pernyataan tuntutan defendan kedua sehingga keempat terhadap

A mereka di bawa A 19 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan di bawah bidang kuasa sedia ada mahkamah. Permohonan tersebut ditolak oleh penolong kanan pendaftar dan pihak ketiga yang kedua merayu.

B **Diputuskan**, menolak rayuan dengan kos:

Oleh kerana pihak ketiga yang kedua bersetuju bahawa kes mereka bergantung kepada penafsiran kl 10.01 subkontrak tersebut antara mereka dan pihak ketiga, pihak ketiga yang kedua tidak boleh menegaskan bahawa tiada kes terhadap mereka untuk menjustifikasikan permohonan untuk membatalkan pernyataan C tuntutan. Selagi pliding-pliding menunjukkan sedikit kausa tindakan atau mem-bangkitkan persoalan yang wajar diputuskan oleh hakim, fakta bahawa kes adalah lemah atau kemungkinan besar tidak akan berjaya tidak akan menjadi alasan bagi pliding dibatalkan (lihat ms 252H–253A); *Citibank Bhd v ND Chandrasegaram Nee & Ors* D [1999] 5 MLJ 440 diikut.]

Notes

For cases on striking out generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4335–4344.

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Cases referred to

Citibank Bhd v ND Chandrasegaram Nee & Ors [1999] 5 MLJ 440 (folld)

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Legislation referred to

Rules of the High Court 1980 O 18 r 19

Mohd Zaini bin Mazlan (*Omar Adam Hon* with him) (*Lee Choon Wan & Co*) for the appellant/second third party.

G *Manjit Singh* (*Azman, Davidson & Co*) for the respondent/second to fourth defendant.

Cur Adv Vult

H **Kamalanathan Ratnam J**:

Facts

The plaintiff sued the first defendant on a breach of contract of employment. He also based his claim against the first defendant and all the other defendants on negligence. The second, third and fourth defendants I took out third party proceedings against the first named third party as the insurers and subsequently against the second named third party, on the basis that the second named third party was the main contractor in respect

of the project and also because the second named third party was named as the 'insured' in the Contractors All Risk Policy. A

The application

The second named third party then took out an application (encl 60) pursuant to O 18 r 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the court for an order that the second, third and fourth defendants' statement of claim against the second named third party be struck out with costs. B

The case for striking out was on the basis that:

(1) the third defendant was, pursuant to the provisions of the sub-contract, responsible for the plaintiff's claim; C

(2) according to the sub-contract the second named third party was only responsible for taking an insurance policy and nothing more than that;

(3) the issue of damages is in law and in fact to be decided between the second, third and fourth defendants and the first named third party; and D

(4) the second named third party should not be responsible for the plaintiff's claim for income, allowance, transportation and other needs.

Having heard the arguments, the learned senior assistant registrar reserved judgment and on 9 July 1999 dismissed encl 60 with costs. E

The appeal

In arguing the appeal before me, En Zaini for the appellant, conceded that the second named third party was indeed the main contractor for the project known as KL Towers. He referred me to cl 10.01 of the sub-contract agreement between his client, the second named third party and the third defendant, the sub-contractor. The said clause reads as follows: F

> The contractor will effect and maintain or cause to be effected and maintained insurances (copies of which shall be available for inspection by the sub-contractor) in the joint names of the contractor, the Government of Malaysia, the employer and, if applicable, any bank or financial institution as the contractor may decide (which policies shall not include any coverage for consequential loss or damage) on the following basis: G

In the course of his submission, counsel conceded that whether the second named third party should indemnify the plaintiff or not, called for the interpretation of the said clause 10.01. Once counsel conceded to this I did not wish to hear any further arguments nor did I want to hear from the respondents. H

If the second named third party was of the view that the case rested upon the interpretation of clause 10.01, surely by no stretch of the imagination could the second named third party contend that there is no case against it, to warrant this application to strike out. In *Citibank Bhd v* I

A *ND Chandrasegaram Nee & Ors* [1999] 5 MLJ 440, I held that so long as the pleadings disclosed some cause of action or raise some question fit to be decided by the judge, the mere fact that the case would be weak and not likely to succeed at trial would not be a ground for the pleadings to be struck out. I applied the same principle to this case and dismissed the appeal with costs.

B *Appeal dismissed with costs.*

Reported by Chin En Tek

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